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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1970

No. 667

BOWATERS SOUTHERN PAPER CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The Petitioner respectfully prays that a Writ of Certiorari Issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 11, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ... F. 2d ... ; 2 F. E. P. Cases 711. The opinion of the District Court for the Eastern District of Tennessee is reported at 304 F. Supp. 33 (1970). The opinion of the Court below denying the Petitioner's Motion for Rehearing was entered on July 17, 1970. All opinions are reprinted in the Appendix[1] hereto.

[1] Hereinafter referred to as (A.....).

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered June 11, 1970, and this Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED

A. Whether a Commissioner of the Equal Employment Opportunity Commission must set forth facts upon which his charge is based, as specifically required by Title VII of the Civil Rights Act of 1964 when he files a Charge pursuant to said Title, where:

(1) The Equal Employment Opportunity Commission has authority to issue Demands for Access to Evidence and to seek their enforcement by Federal District Court action;

(2) Congress intended that Federal District Courts make the determination as to the "relevancy and materiality" of information sought by a Commission's Demand based upon the facts set forth in the charge thus providing procedural safeguards, and;

(3) The Respondent Company, Petitioner in this action, does not have access to the broad discovery tools provided in the Federal Rules of Civil Procedure in normal court proceedings and is thus unable to ascertain with any specificity the charges leveled against him.

B. Whether the Commissioner's failure to set forth facts upon which his charge is based as specifically required in the Act and a subsequent filing of a voluminous and burdensome Demand for Access to Evidence results in a denial of due process of law, where:

(1) The burdensome nature of the Demand for Access is increased by the absence of facts in the Commissioner's charge, and;

(2) The Respondent Company, Petitioner herein, is faced with considerable expense and expenditure of manpower as a result of the Demand for Access to Evidence.

C. Whether the failure of the Commissioner's charge to meet statutory requisites results in a further failure to adequately place the Respondent Company on notice of the charges being leveled against it by EEOC and thereby denies the Respondent Company effective representation of counsel.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Sec. 2000e-5(a) (706(a) of the Civil Rights Act of 1964)

"(a) **Whenever** it is charged in writing under oath by a person claiming to be aggrieved, or **a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this sub-chapter has occurred (and such charge sets forth the facts upon which it is based) that an employer,** employment agency, or labor organization **has engaged in an unlawful employment practice, the Commission shall furnish such employer,** employment agency, or labor organization (hereinafter referred to as the 'respondent') **with a copy of such charge and shall make an investigation of such charge,** provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission

shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year."

Sec. 2000e-8(a) (Sec. 709(a) of the Civil Rights Act of 1964)

"(a) In connection with any investigation filed under Section 2000e-5 of this Title, **the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence** of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is **relevant to the charge under investigation.**"

Sec. 2000e-9(a), (b), (c) and (d) (Sec. 710 of the Civil Rights Act of 1964)

"(a) **For the purposes of any investigation of a charge filed under the authority obtained in Section 2000e-5 of this Title, the Commission shall have authority** to examine witnesses under oath and **to require the production of documentary evidence relevant or material to the charge under investigation.**

"(b) If the Respondent named in a charge filed under Section 2000e-5 of this Title fails or refuses to comply with a demand of the Commission for permission to

examine or copy evidence in conformity with the provisions of Section 2000e-8(a) of this Title, or if any person required to comply with the provisions of Section 2000e-8(e) or (d) of this Title fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath the United States District Court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of Section 2000e-8(e) or (d) of this Title or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

"(c) **Within twenty (20) days after the service upon any person charged under Section 2000e-5 of this Title of a demand by the Commission for the production of documentary evidence** or for permission to examine or copy evidence in conformity with the provisions of Section 2000e-8(a) of this Title, **such person may file in the District Court of the United States for the judicial district in which he resides, or transacts business, and serve upon the Commission a petition for an order of such Court modifying or setting aside such demand.** The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the Court shall not run during the pendency of such petition in the Court. **Such petition shall specify each ground upon which the Petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with provisions of this sub-chapter or with the limitations generally applied to compulsory process or upon any**

constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under sub-section (b) of this Section for enforcement of such a demand and unless such proceeding is commenced by the Commission prior to the expiration of the twenty (20) day period, or unless the Court determines that the Defendant could not reasonably have been aware of the availability of such ground of objection.

"(d) In any proceeding brought by the Commission under subsection (b) of this Section, except as provided in subsection (c) of this Section, the Defendant may petition the Court for an order modifying or setting aside the demand of the Commission.

REGULATIONS INVOLVED

29 C. F. R. 1601.11:

(a) Each charge should ~~contain~~ the following:

(1) The full name and address of the person making the charge.

(2) The full name and address of the person against whom the charge is made (hereinafter referred to as Respondent).

(3) **A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice.**

(4) If known, the approximate number of employees of the Respondent Employer or the approximate number of members of the Respondent Labor Organization, as the case may be.

(5) A statement disclosing whether proceedings involving alleged unlawful employment practice have

been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and if so, the date of such commencement and the name of the authority.

STATEMENT OF THE CASE

This is a proceeding under Title VII of the Civil Rights Act of 1964, 42 U. S. C., 2000e, *et seq.* The Equal Employment Opportunity Commission (hereinafter referred to as the Commission) after the filing and serving of a Commissioner's charge (A. 1) served a Demand for Access to Evidence (A. 2) on Bowaters Southern Paper Corporation (hereinafter referred to as Petitioner). The Petitioner then initiated a proceeding in the United States District Court with a petition to set aside the Commission's Demand. The Commission responded with a cross-petition seeking enforcement of its "Demand" and the District Court refused to enforce this Demand (A. 5). An Appeal followed to the United States Court of Appeals for the Sixth Circuit which resulted in a *per curiam* reversal and remand of the District Court's Decision (A. 19). The Petitioner then filed a Motion for Rehearing which was subsequently denied (A. 22). The Petitioner then sought a Stay of Issuance of Mandate of the Sixth Circuit in order to seek Certiorari from this Court which was granted.

The Bowaters Southern Paper Corporation operates the plant which is involved in these proceedings at Calhoun, Tennessee. During the time span pertinent to the case presented to this Court for review, the plant employed approximately 1,250 employees, most of whom were covered by the terms and conditions of labor agreements with three international unions. The employees subject to these labor agreements numbered approximately 1,000 and were divided at the time of receipt of the Charge from the

Commission into twelve departments and placed into approximately 148 separate job classifications or categories. In addition, in 1967 there were approximately 250 employees not covered by any of the three labor agreements, performing jobs in a variety of capacities such as supervision, clerical, professional, technical and managerial. (Affidavit of Mr. Joseph O. Evans, A. 23).

The relevant facts and circumstances giving rise to this proceeding are undisputed, and may be summarized as follows: On July 19, 1967, EEOC Commissioner Samuel Jackson filed with the EEOC a Charge pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e-5. The Charge was served on Petitioner on August 18, 1967 and on August 23, 1967, an EEOC investigator visited the Petitioner's plant at Calhoun, Tennessee, seeking voluminous information and desiring to conduct an extensive investigation. The investigator told representatives of the Petitioner that he could furnish no further details beyond what were contained in the Commissioner's Charge. Because of the vagueness of the Charge, Petitioner requested an opportunity to consult with counsel before turning over all of Petitioner's books and records to the investigator.

On September 26, 1967, Counsel for Petitioner wrote a letter to the EEOC investigator requesting further advice as to the facts upon which the charge was based in order that he might properly advise the Petitioner as to the relevancy of the information requested. Receipt of this letter was acknowledged by the Commission and the Petitioner was told they would be contacted "in the near future". Petitioner received no further response.

On August 3, 1968, the Commission served upon Petitioner its "Demand for Access to Evidence". This Demand called for production of substantially all of Petitioner's personnel and employment records for the period from January 1967 through January 1968.

Again, on August 15, 1968, Counsel for Petitioner formally renewed its previous request for more details from the Commission by a "Motion to Set Forth and Produce Facts Upon Which Commissioner's Charge Is Based". The Commission's General Counsel denied this Motion on September 18, 1968.

On August 22, 1968, within the twenty (20) days required by Sec. 710(c), 42 U. S. C. 2000e-9(c), Petitioner filed its Petition for Judicial Review of the Commission's Demand for Access.

The Commissioner's Charge which precipitated the controversy leading to this Petition for Writ of Certiorari alleged that Petitioner practiced three very general types of discriminatory practices: discrimination in job classification, discrimination in the use of tests, and discrimination in apprenticeship and on-the-job programs. The Charge contained no statement of facts upon which the allegations were made nor did it set forth dates or time spans during which the discriminatory practices were alleged to have occurred.

In contrast, the Commission's Demand would require, *inter alia*, a list of all persons presently employed at the Calhoun plant of the Company, said list to include the following information for each employee: name, address, racial identity, department assignment, job classification or title, plant department and job classification, and seniority date. Significantly, it should be noted that the requested information further requires a list of all employees hired by the Calhoun plant between January 19, 1967 and January 19, 1968. The Demand also requires a list of all employees of the Calhoun plant receiving promotions between January 19, 1967 and January 19, 1968. The Commission also seeks access for examination and copying of all applications for employment received and employment tests given at the plant between January 19,

1967 and January 19, 1968, and a list of all employees filling vacancies pursuant to the collective-bargaining agreement and a written statement compiled by the Petitioner summarizing the criteria applied in selecting employees to fill temporary vacancies as well as like and related information.

The burdensome nature of providing the information requested in the Commissioner's Demand for Access is a matter of record which is undisputed in the Court below. With regard to only one area of the Commission's Demand, that on transfers, it is reasonably estimated that a staff of clerical employees would require weeks to re-compile the information requested. It is sincerely felt that preparation of the bulk of this information could be avoided if the Commissioner's Charge set forth only such reasonable basic information as identification of times, dates, places, events, job classifications and the departments involved.

Perhaps the best test of the sufficiency of this Commissioner's Charge or, more accurately stated, the insufficiency of this Charge, are the Company's attempts to date to verify its truth or falsity. For example, the Company has reviewed its records for the ninety (90) days preceding the date of the Commissioner's Charge, January 19, 1967, and could find no occasion of record when the Company even had an opportunity to act upon the results of any tests given Negro employees seeking transfer. The Company also found no current application for transfer from any Negro employee during that period of time. In addition, the Company does not operate any apprentice programs and, therefore, is unable to determine how this came to be in the Charge. (Affidavit of Mr. Evans, A. 6).

In the face of this inability to learn or determine even the fundamental factual allegations of the Commissioner's Charge, the Company is faced with gathering the voluminous information sought by the Commission.

REASONS FOR GRANTING WRIT

The importance of this case is, in Petitioner's view, apparent. A Federal Statute specifically provides that a Commissioner's Charge must "set forth facts upon which it is based." The Charge in question here does not meet this statutory standard. The case, therefore, presents the fundamental question, must a Commissioner's Charge, to be valid, set forth the facts upon which it is based? The Statute says that it must. On this issue hangs the vitality of the Constitutional safeguards which Congress intentionally and pointedly placed in Title VII of the 1964 Civil Rights Act. To allow the Commission to proceed on such a vague and inadequate charge reduces to hollow rhetoric the congressional requirement that such charges set forth facts upon which they are based. This, in turn, reduces the role assigned by Congress to the Federal District Courts of determining the relevancy of evidence sought by the Commission in Demand Proceedings a mere "rubber stamping" process. A Writ of Certiorari should be granted because of the overriding importance of this case and because the decision below is on an important question of Federal Law which has not been, but should be decided by this Court.

I. This Case is of Overriding Importance. Congress Intended that the Federal Courts Protect Private Rights in Investigations by the Commission Under Title VII of the Civil Rights Act of 1964.

Congress placed in the United States District Courts the discretion to determine whether or not particular information sought by the Commission is "relevant and material" to the charge made by any Commission.[2] The clear man-

[2] See Sec. 709(a) of the Civil Rights Act of 1964 (42 U. S. C. 2000e-8(a)).

date of Section 706 of the Civil Rights Act is that the Commissioner's charge must "set forth the facts upon which it is based." This was intended to establish the base upon which the District Courts could determine whether or not the particular information sought in a demand is relevant and material. A broadly based, vague charge such as that at issue here does not permit a judicial determination of relevancy or materiality.

The Court below has not made and, in fact, is unable to make a determination as to the relevancy or materiality of the information covered by the Commissioner's Demand. The District Court determined that the Commissioner's charge failed to set forth sufficient facts to make this determination. Petitioner respectfully submits this charge falls short of the statutory standards established by Congress in Title VII of the Civil Rights Act of 1964.[3]

The plain language of the statute and the implementing regulations issued pursuant to the statute consistently require as a minimum that the charge set forth time, dates and other such pertinent information not contained in this Charge.[4] To fail to set forth such dates as required in the regulations further complicates the Court and Respondent's task and makes it impossible to determine whether or not the alleged act or acts of misconduct took place within the statutory 90-day period preceding the filing of the Charge.[5]

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[3] See Sec. 706(a) of the Civil Rights Act of 1964 (42 U. S. C. 2000e-5(a)).

[4] See 29 C. F. R. 1601.11.

[5] See Sec. 706(d) of the Civil Rights Act of 1964 (42 U. S. C. 2000e-5(d)), which provides: ". . . A charge under Subsection (a) shall be filed within 90 days after the alleged unlawful employment practice occurred . . . ." See also, **Goodman v. City Products Corp.**, . . . F. 2d . . . ; 2 F. E. P. Cases 608 (6th Cir., May 14, 1970).

The District Court found in its decision that "... in this instance Congress clearly stated that a Commissioner's charge must '. . . . set forth the facts upon which it is based.'" The District Court goes on to say:

> "In this case the Commissioner merely charged Bowaters with three general types of discriminatory practices: discrimination in job classification, discrimination in the use of tests, discrimination in the apprenticeship and on-the-job programs. As to what facts the Commissioner may have had as a basis for making these charges, there is not a word in the charge. The Court is accordingly of the opinion that the charge failed to comply with the requirements of Sec. 2000e-5(a) of the Act."

Bowaters Southern Paper Corp. v. EEOC, 304 F. Supp. 33, 71 LRRM 2113, 2118 (1970).

If the Court of Appeals' decision in this case is allowed to stand, it will subject all who are subject to the provisions of Title VII of the Civil Rights Act of 1964 to the whim of the Commission and its individual investigators as to what is relevant and material to a charge under investigation and will have the result of totally removing the procedural safeguards intentionally built into the Act by Congress.

II. The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

While no explicit conflict exists between circuits on this same matter, another Circuit has indicated it would decide the question differently. The Tenth Circuit Court of Appeals in a recent decision implicitly adopted the position of the Federal District Court below. The problem presented in the Tenth Circuit related to suits instituted

by the Attorney General of the United States under 42 U. S. C. A. 2000e-6(a). Judge Hill stated at page 9 of the slip opinion in that case:

> "There is no requirement here, as there is in Sec. 2000e-5(a), that the charge set forth facts upon which it is based. We view that Section and the one presently under consideration fundamentally variant because of the language employed, the persons governed by the Section, and the historical dissatisfaction with fact pleading in judicial forms. We thus do not feel bound by Bowaters Southern Paper Corporation v. Equal Employment Opportunity Commission, Civil No. 5351 (E. D. Tenn., May 5, 1969)."
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> **United States v. Gustin-Bacon Division, Certainteed Products Corporation et al., 426 F. 2d 539, 543 (10th Cir., April 30, 1970).**

In light of the decision of the Sixth Circuit in the instant case, we feel that it can be accurately stated that a difference of interpretation exists between circuits.

In a recent review of the legislative history and determination of EEOC's investigatory authority, a District Court in South Carolina was faced with the same problem and concluded after lengthy review:

> "The legislative history of the Act makes it clear that Congress intended to deny the Commission the broad investigatory powers of other Federal agencies and to carefully circumscribe its authority of investigation."
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> **Graniteville Company v. EEOC, . . . F. Supp. . . ., 2 F. E. P. Cases 204 (D. C. S. C., October 30, 1969), Appeal Pending Fourth Circuit.**

There have also been several other cases in which district courts dealt with this problem and made findings of "rele-

vancy" as to the information sought in a Demand.[6] Title VII of the Act provides for judicial review when compulsory process is sought pursuant to a charge and is challenged by a petition under Section 710(c), 42 U. S. C. 2000e-9(c). Section 709(a), 42 U. S. C. 2000e-8(a) authorizes EEOC to have access to evidence "relevant to the charge under investigation." Section 710(a), 42 U. S. C. 2000e-9(a) authorizes compulsory process for the production of evidence "relevant and material to the charge under investigation." Relevancy is a factual matter, which can be determined only on the basis of facts. EEOC's procedure in the present case, pursuant to a charge setting forth none of the facts on which it is based, deprives Petitioner of its right to an independent judicial review on the Demand.

It cannot be doubted that the recipient of an administrative agency's efforts to compel the production or access to corporate books and records is entitled to the safeguards afforded by the Fourth Amendment to the U. S. Constitution. **See v. Seattle**, 387 U. S. 541, 544 (1967); **United States v. Morton Salt Co.**, 338 U. S. 632, 652-653 (1950); **Oklahoma Press Publishing Co. v. Walling**, 327 U. S. 186, 206-09 (1946); **Federal Trade Commission v. American Tobacco Co.**, 264 U. S. 298, 306-07 (1924); **Fleming v. Montgomery Ward and Co.**, 114 F. 2d 384, 391-92 (7th Cir., 1940), cert. den. 311 U. S. 690 (1940); **Goodyear Tire and Rubber Co. v. National Labor Relations Board**, 122 F. 2d 450 (6th Cir., 1941); **Montship Lines Ltd. v. Federal Maritime Board**, 295 F. 2d 147 (D. C. Cir., 1961); **Hellenic Lines, Ltd. v. Federal Maritime Board**, 295 F. 2d 138 (D. C. Cir., 1961). Accordingly, such production cannot be util-

[6] See, **South Central Bell Telephone v. EEOC**, ... F. Supp. ...; ... F. E. P. Cases 430 (E. D. La., 1970); **Parliament House Motor Hotel v. EEOC**, ... F. Supp. ...; 63 L. C. 9501 (D. C. Ala. 1970) and **Rogers v. EEOC**, ... F. Supp. ...; 63 L. C. 9495 (D. C. Tex., 1970).

ized to permit an agency to examine all of a corporation's records, relevant or not, but must be preceded by an affirmative showing that the records sought are actually relevant to the particular inquiry being conducted.

Relevancy may be shown not to exist when the facts are set forth which make clear the particular matter or matters EEOC is attempting to investigate. Thus, in **Union Bank v. EEOC**, 296 F. Supp. 313 (D. C. Calif., 1967), a charge of unlawful employment practices as to a particular employee did not support a Demand for Documents relating to other employees in other departments.[7] Petitioner will further develop in his Brief if Certiorari is granted its argument in this regard.

It is clear from the legislative history that Congress adopted the standard of relevancy to limit the scope of investigations to be conducted by the Commission.[8] There

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[7] See **Oatis v. Crown Zellerbach Corporation**, 398 F. 2d 496 (5th Cir., 1968); **Madlock v. Sardis Luggage Co.**, ... F. Supp. ...; 2 F. E. P. Cases 4, 7 (N. D. Miss., 1969); **Hogan v. Capitol Fish Company**, ... F. Supp. ...; 1 F. E. P. Cases 717 (N. D. Ga., 1968); **Carter v. Holt Williamson Mfg. Co.**, ... F. Supp. ...; 2 F. E. P. Cases 678 (E. D. N. C., 1969); and **Gerstle v. Continental Airlines, Inc.**, ... F. Supp. ...; 2 F. E. P. Cases 830 (D. Col., 1970).

[8] See **House Debate**, February 8, 1964, pp. 2571-2573. In the debate in the House over Congressman Celler's amendment limiting to the standard of reasonable access to relevant material EEOC's authority to inspect and copy records in connection with the investigation of an alleged unlawful employment practice, Mr. Goodell commented:

> "I think the gentleman reversed it. The phrase 'that relates to any matter under investigation' or in question is a narrow phrase. It is to limit the investigation to those matters that are in question here. It is a limiting phrase confining and restricting the Commission's authority to relevant evidence."

See also Senator Dirksen's explanation of the Commission's right to investigate which, in part, is as follows:

> "This sub-section (709(a)), which permits the Commission to examine and copy any evidence of a person being investi-

is at no place in the legislative history a suggestion that Congress intended to provide EEOC with investigatory powers other than those narrowly circumscribed, and these are to be exercised under the watchful eye of the Federal Courts as the result of the unique requirements of Sec. 710(c).

In the Senate, the late Senator Dirksen challenged the scope of the Commission's power to investigate by addressing the following question to his colleague, Senator Clark, one of the floor managers of Title VII:

> ". . . What protection is afforded to an employer from fishing expeditions by investigators in their zeal to enforce Title VII? Examiner Section 709(a) . . . The Commission or its designated representative shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Can there be a greater grant of investigatory authority? I can recall none. Should the Commission be permitted to copy evidence? Should an employer be permitted to request detailed list of the records to be examined by the Commission? Should the employer be permitted to go before a competent court in order to determine what records relate to any matter under investigation or in question? Or are we to allow the Commission carte blanche authority in its examination, in its copying of evidence, in its inquiry? Should this examination be limited to specified documents? How broad can such inquiry

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gated that relates to any matter under investigation or in question, has been limited to the examination and copying of evidence which relates to unlawful employment practices covered by the Title and is relevant to the charge under investigation."

Graniteville v. EEOC, *supra* at .....

be? It will be limited only by determination of the Commission. No private rights will remain."

Senator Clark (of Pennsylvania) responded:

"... The Commission should have the power to copy information from the records which it requires to be kept. It will specify by regulation what records must be kept and notify the employer which of those records it wishes to see. The employer is entitled to a day in court before the Commission inspects any records; he can contest the subpoena. **Private rights will be amply protected by the courts.**" (Emphasis added.)

The Petitioner as a Respondent in an EEOC case does not have access to the discovery procedures provided for in the Federal Rules of Civil Procedure that Petitioner would have in a case filed in a Federal District Court. "Private rights" can only be protected in Demand Proceedings by requiring Commissioners to set forth facts and thus permit meaningful judicial inquiry concerning relevancy and materiality of information sought. The decision of the Court below has the effect of denying to Petitioner the right of a judicial determination as to whether or not the records requested by the Commission's Demand are relevant and material to the charge under investigation. This points up again the difficult position the District Court and the Petitioner-Company is placed in by such vague and incomplete Commissioner's charges.

Petitioner respectfully submits that to allow a Commissioner to file such vague and indefinite charges is to permit members of the Commission which is charged with responsibility for enforcing and administering this important piece of Federal legislation to disregard definite requirements set forth therein. The resultant denial of fundamental procedural safeguards Petitioner feels raises an important Federal question which this Court should review.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted

CONSTANGY & PROWELL

By FRANK A. CONSTANGY

JAMES F. SMITH

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1900 Peachtree Center Building
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By JOHN T. HENNISS
1100 American National Bank Building
Chattanooga, Tennessee 37402
Of Counsel for Bowaters Southern Paper Corporation, Petitioner

APPENDIX A

EXHIBIT 1.

Equal Employment Opportunity Commission
Washington, D. C.

Commissioner's Charge.

Pursuant to Section 7706 (a) of the Civil Rights Act of 1964, I charge the following company with unlawful employment practices:

BOWATERS SOUTHERN PAPER CORPORATION
Calhoun, Tennessee 37309

I have reasonable cause to believe said company is within jurisdiction of the Equal Employment Opportunity Commission and has engaged in the following unlawful employment practices:

1. Maintenance of racially restricted job classifications.

2. Discriminatory use of tests, restricting Negro employees to lower paying jobs.

3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs.

Date: Jul. 19, 1967.

Samuel Jackson,
Commissioner.

APPENDIX B

EXHIBIT 2.

United States of America
Equal Employment Opportunity Commission

Demand for Access to Evidence.

To: Bowaters Southern Paper Corporation
Calhoun, Tennessee 37309

ATTN: .....
Plant Manager
Bowaters Southern Paper Corporation
Calhoun Plant
Calhoun, Tennessee 37309

Re: Case No. CBI 68-12-312

Pursuant to Section 710 of the Civil Rights Act of 1964, you are hereby required and directed to grant, on August 22, 1968, at Calhoun Plant, Calhoun, Tennessee, to Mr. Donald W. Muse, a duly authorized representative of the Equal Employment Opportunity Commission, access to the following information in your possession or control:

1. A list of all persons presently employed at the Calhoun Plant, said list to include the following information for each employee:

a. Name, address, and identity as to race.

b. Departmental assignment.

c. Job classification or title.

d. Plant, departmental, and job classification seniority dates.

c. Rate of pay, including overtime compensation rate.

2. A list of all employees hired by the Calhoun Plant between January 19, 1967, and January 19, 1968, said list to include the following information for each such employee:

a. Name, address, and identity as to race.

b. Departmental assignment.

c. Job classification or title.

d. Rate of pay, including overtime compensation rate.

3. A list of all employees at the Calhoun Plant receiving promotions or job classification reassignments between January 19, 1967, and January 19, 1968, said list to include the following information for each such employee:

a. Name, address, and identity as to race.

b. Job classification and departmental assignment before promotion or reassignment.

c. Job classification and departmental assignment after promotion or reassignment.

4. Access for examination and copying of all applications for employment received, and employment tests given, at the Calhoun Plant between January 19, 1967, and January 19, 1968.

5. A list of all employees filling temporary vacancies under Section V, Seniority, of the current collective bargaining contract between January 19, 1967, and January 19, 1968, said list to include the following information for each such employee:

a. Name, address, and identity as to race.

b. Job classification and department worked on the basis of a temporary assignment or transfer,

and rate of pay, including overtime compensation rate.

c. Job classification and department to which the transferred employee is normally assigned, and rate of pay, including overtime compensation rate.

6. A written statement summarizing the criteria, other than seniority, applied in selecting employees to fill temporary vacancies under Section V, Seniority, of the current collective bargaining contract.

And any like or related records relevant to an investigation of Charge No. CBI 68-12-312 alleging that Bowaters Southern Paper Corporation is engaging in unlawful employment practices at its Calhoun, Tennessee Plant by the maintenance of racially restricted job classifications, the discriminatory use of test, resulting in the restriction of Negro employees to lower paying jobs, and denial of opportunities for participation in apprenticeship and or on-the-job training programs to Negro employees. Failure or refusal to comply with this demand may cause the Commission to apply to the United States District Court for an order requiring compliance.

In Testimony Whereof I have hereto set the Seal of the Equal Employment Opportunity Commission and have affixed my signature this the 15 day of August, 1968.

Equal Employment Opportunity Commission,
2121 8th Avenue, North,
Birmingham, Alabama,

/s/ Alan J. Gibbs,
Alan J. Gibbs,
Area Director,
Equal Employment Opportunity
Commission.

APPENDIX C

In the United States District Court for the
Eastern District of Tennessee
Southern Division

Bowaters Southern Paper Corp.

vs.

Equal Employment Opportunity Commission.

Civil Action No. 5351.

Opinion

This is a proceeding under Subchapter VI, Equal Employment Opportunities, of the Civil Rights Act of 1964, 42 U. S. C., § 2000e to § 2000e-15. Before the Court is a petition to set aside a demand for access to evidence and a cross-petition for an order enforcing the Equal Employment Opportunity Commission's demand for access to evidence. The case has been submitted upon admissions in the pleadings and upon affidavits. Oral argument was had pursuant to the Court's order to show cause and the case is now before the Court upon voluminous briefs filed by each party.

The relevant facts appear to be undisputed and they may be summarized as follows. Bowaters Southern Paper Corporation operates a large paper mill at Calhoun, Tennessee, wherein 1250 persons are employed. On July 19, 1967, Samuel Jackson, a member of the United States Equal Employment Opportunity Commission, filed a charge with that Commission wherein he stated that he had reasonable cause to believe that Bowaters had engaged in unlawful employment practices in violation of—

§ 703 of Title VII of the Civil Rights Act of 1964 (42 U. S. C. 2000e-2). The charge was filed pursuant to § 706 of the Act (42 U. S. C. 2000e-5) as a means of initiating an investigation by the Commission. Since the legal sufficiency of the charge is a principal issue in the case, the charge will be set forth in full and it is as follows:

Commissioner's Charge

Pursuant to Section 706(a) of the Civil Rights Act of 1964, I charge the following company with unlawful employment practices:

BOWATERS SOUTHERN PAPER CORPORATION
Calhoun, Tennessee 37309

I have reasonable cause to believe said company is within jurisdiction of the Equal Employment Opportunity Commission and has engaged in the following unlawful employment practices:

1. Maintenance of racially restricted job classifications.

2. Discriminatory use of tests, restricting Negro employees to lower paying jobs.

3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs.

JUL 19, 1967
Date

s/ Samuel Jackson
Commissioner

A copy of the charge was served upon Bowaters on August 18, 1967, and, shortly thereafter an investigator for the Commission visited the Bowaters plant to undertake an investigation. At that time the representative of Bowaters insisted that the Company had at all times

conducted its operations in full compliance with the law and attempted to obtain further information as to the nature and details of the alleged violation. The investigator was unable to provide anything further than that set forth in the charge. At that time certain requested information was provided the investigator, but in view of his inability to provide further details as to the basis of the charge, the representative of Bowaters requested an opportunity to consult with the Company's legal counsel before making available all of the requested records of the Company. Thereafter, on September 26, 1967, the attorney for Bowaters directed a letter unto the Commission investigator, in which letter he denied any discriminatory employment practices on the part of the Company, assured the Commission cooperation on the part of Bowaters in the investigation, but again requested further advice as to the source and nature of any alleged discriminatory employment practice in order that he might advise Bowaters with regard to the relevancy of the information requested. This letter was acknowledged by the investigator with the assurance that it would be given consideration.

However, nothing further appears to have occurred with regard to the investigation until August 3, 1968, when the Commission caused to be served on Bowaters a "Demand for Access to Evidence." This document is set forth in full in a footnote,[1] it being sufficient here to state that the demand directed Bowaters to grant a Commission investigator access to substantially all of its personnel and employment records covering the period from January 1967 through January 1968.

Bowaters thereupon promptly filed with the Commission a document entitled "Motion to Set Forth and Produce Facts on Which Commissioner's Charge Is Based," in which it again requested further information in regard

to the matters which form the basis for issuing the charge. This motion was denied by the general counsel for the Commission, it being his position that the filing of a charge was an individual right of a commissioner, that the charge as filed was legally sufficient, and that the charge accordingly was not subject to Commission review as requested in the motion.

Meanwhile, this action to obtain judicial review of the Commission demand for access to evidence was filed upon August 22, 1968, the same being filed pursuant to the provisions for such judicial review as contained in § 710 of the Act [42 U. S. C., § 2000e-9(c)], the petition being filed within the 20 day limitation provided therein. An answer and cross-petition was duly filed by the Commission seeking enforcement of its demand for access to evidence. The case then proceeded to a hearing upon the Court's show cause order.

Upon this state of the record it is the contention of Bowaters that the Commission's demand for access to evidence is invalid and should be set aside for the following reasons:

(1) The demand is based upon an invalid charge in that (a) the charge *fails to "set forth the facts upon* which it is based" as is required by § 706(a) [42 U. S. C., § 2000e-5(a)] of the Act; and (b) the charge fails to make "a clear and concise statement of the facts constituting the alleged unlawful employment practice" as required by the Commission's own rules (29 C. F. R. 1601.11).

(2) The demand is invalid in that it seeks evidence, the relevance of which cannot be determined by the Court in the absence of any statement in the charge of facts upon which the charge is based, the Commission's investigative authority being limited by § 709 [42 U. S. C., § 2000e-8(a)] to the obtaining of evidence that is "relevant" to the charge under investigation."

(3) Both the failure to set forth the facts upon which the charge is based and the broad scope of the demand violate Bowaters' right to be secure from unreasonable searches and seizures under the IV Amendment to the Constitution and their right to procedural due process including the right to reasonable notice and the right to representation by legal counsel under the V Amendment to the Constitution.

(4) The evidence sought in the demand is unduly burdensome.

In response the Commission denies each contention of Bowaters and asserts that its Demand for Access to Evidence should be enforced by the Court. The Commission's position upon each contention of Bowaters is as follows:

(1) The demand should be enforced by the Court as a valid demand in that (a) it is based upon a charge that is valid both under the law and under the commission's own regulations; (b) the validity of the demand is not dependent upon the validity of the charge as the only function of the charge is to initiate a Commission investigation, so that the demand's validity is dependent only upon the investigative jurisdiction of the Commission as defined by statute; and (c) the sufficiency of the facts to support the charge addresses itself only to the discretion of the commissioner who makes the charge and the validity of the charge addresses itself only to the Commission, and neither of these matters is subject to judicial review.

(2) The evidence sought by the demand is within the investigative authority of the Commission and is clearly relevant to the suspected violations as stated in the charge.

(3) The demand violates no constitutional rights of Bowaters under either the searches and seizures provisions

of the IV Amendment nor under the due process provisions of the V Amendment.

(4) The granting of access by the Commission to the evidence sought in the demand would not be burdensome unto Bowaters.

The purpose of the Equal Employment Opportunity subchapter of the Civil Rights Act of 1964 is of course to eliminate discrimination in employment based upon race, color, religion, sex, or national origin. In general this purpose is to be accomplished both by administrative and judicial proceedings, with the initial and primary responsibility for preventing and eliminating unlawful employment practices being vested in the Federal Equal Employment Opportunity Commission. The general procedure outlined by the Act is that upon the filing of a written charge of a violation of the Act, such charge to be filed either by an aggrieved person or by a member of the Commission, the Commission shall provide the suspect employer, employment agency, or labor union, as the case may be, with a copy of the charge and then undertake an investigation of the charge. In furtherance of its investigation the Commission may examine witnesses, require the production of documents, and generally have access to relevant and material records in the possession of the person being investigated. Provision is made for a judicial review of any Commission demand for access to evidence, with provision for judicial relief from an unlawful demand and judicial enforcement of a lawful demand. Upon completion of the investigation, if two or more members of the Commission believe that reasonable cause exists for crediting the charge, the Commission must then endeavor to eliminate any such unlawful practice by informal methods of conference, conciliation and persuasion. Should these methods not be successful, provision is then made for judicial enforcement of

the Act upon the initiation of a lawsuit for that purpose by the aggrieved party or parties or by the United States Attorney General, but not at the instance of the Commission.

Taking up first the contention of the parties with respect to the sufficiency of the charge and its relationship to the validity of the demand, these matters must initially be tested by the relevant statutory provisions authorizing a proceeding of the nature here involved.

The provisions of the Acts relating to the filing of a charge are contained in § 2000e-5(a), Title 42 U. S. C. A., which provide in relevant part as follows:

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization . . . with a copy of such charge and shall make an investigation of such charge . . . If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

The Commission demand for access to evidence in this cause purports to have been made pursuant to § 2000e-9(a), which provides in relevant part as follows:

> For the purpose of any investigation of a charge filed under the authority contained in section 2000e-5 of

> this title, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

However, it would appear unto the Court that the authority for the demand in this instance is more properly contained in § 2000e-8(a), wherein it is provided:

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

The present petition to set aside the demand was made pursuant to § 2000e-9(c) of the Act, which provides in relevant part as follows:

> Within twenty days after the service upon any person charged under section 2000e-5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e-8(a) of this title, such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand . . . Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subchapter or with the limitations generally appli-

> cable to compulsory process or upon any constitutional or other legal right or privilege of such person.

And finally, the Commission's cross-petition for an order enforcing the demand is made pursuant to § 2000e-9(b) of the Act, which provides in relevant part as follows:

> If the respondent named in a charge filed under section 2000e-5 of this title fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 2000e-8(a) of this title . . . the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission have jurisdiction to issue to such person an order requiring him . . . to comply with the demand of the Commission. . . .

It is on the basis of the foregoing statutory language that the principal attack is mounted by Bowaters on the validity of the demand here involved and that the principal defense against that attack is asserted by the Commission. In brief, it is the contention of Bowaters that § 2000e-5(a) of the Act makes the filing of a charge a prerequisite to the initiation of an investigation by the Commission and requires that the charge must "set forth the facts on which it is based." Bowaters contends that the charge here involved fails to set forth any facts upon which it purports to be based. In the absence of a charge which sets forth the facts upon which it is based, it is contended that neither Bowaters nor the Court can test whether the commissioner filing the charge had "reasonable cause to believe a violation of this subsection has occurred" nor whether the evidence sought "is relevant to the charge under investigation." It is further contended by Bowaters that § 2000e-9(c) of the Act specifically authorizes the Court to set aside a demand whenever it is made to appear that it fails "to comply with

the provisions of this subchapter or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person."

To the contrary, and likewise in brief, it is the contention of the Commission that not only does the charge here involved "set forth the facts on which it is based" but that once the charge was filed and accepted by the Commission and a Commission investigation begun thereon, the validity of the charge as being sufficient to initiate an investigation has thereby been established and this issue is not subject to further judicial review. The statutory requirement of "reasonable cause" for issuing the charge addresses itself to the discretion of the charging commissioner and need not be demonstrated in the charge other than by the act of the commissioner in signing the charge. Accordingly, neither "reasonable cause" nor the sufficiency of the charge is subject to judicial review. That the evidence sought by the demand in this case "is relevant to the charge under investigation" is clear and the Court may make this determination from the matters stated in the charge.

Amidst all of the conflicting contentions advanced by the parties in this cause and amidst all of the legal debate engaged in by astute and able counsel on each side, one sure and certain legislative fact stands out, and that is that Congress requires not only that a charge be filed as a prerequisite to the institution of an investigation by the Commission, but also that when a charge is filed by a commissioner it must "set forth the facts upon which it is based." The Commission makes most appealing arguments to the effect that Congress did not intend to introduce special pleading requirements with regard to commissioner's charges; that pleading is generally held unimportant in administrative law and practice; that Congress

intended no distinction between an aggrieved individual's charge and a commissioner's charge with regard to the inclusion of facts; that the very purpose of Congress in providing that charges may be filed by a commissioner was to avoid disclosure of the identity of individual complainants; and that the disclosure of supporting facts is not required under other legislation, such as the National Labor Relations Act, where charges are provided as a means of initiating an administrative investigation. Furthermore, the Commission appears to be on sound ground when it asserts that there would be no constitutional prohibition to Congress permitting investigations of corporate behavior based upon nothing more than official curiosity. **United States v. Morton Salt Company**, 338 U. S. 632, 94 L. Ed. 401, 70 S. Ct. 357. (1949). These matters, however, each direct themselves more to the wisdom or lack of wisdom of Congressional action than they do to what Congress in fact did, for in this instance Congress clearly stated that a commissioner's charge must "set forth the facts upon which it is based."

Insofar as the statutory issues raised in this case are concerned, the real issues for decision of the Court accordingly are whether (1) the charge in this case "sets forth the facts on which it is based" and (2) if it does not, whether the instant demand is thereby subject to be set aside on judicial review. One other statutory issue is raised by Bowaters and disputed by the Commission and that is the somewhat related issue of whether the charge must recite on its face the facts relied upon by the Commissioner as giving him "reasonable cause to believe" a violation had occurred. But this issue can appropriately await the decision of the foregoing matters as their resolution may be decisive of the case.

With regard to whether the charge here involved sets forth the facts upon which it is based, the Court is of the

opinion that it does not. Admittedly a line cannot be clearly drawn delineating and distinguishing a charge from an allegation of fact. See 14 C. J. S. 401 and 35 C. J. S. 489. It is clear, however, that Congress, in using both terms, was expressing two concepts, and it is reasonable to assume that when Congress stated that the charge should set forth the facts on which it was based it intended the Commissioner to do just that. This does not necessarily mean that the identity of an informant must be disclosed, nor does it mean that the charges must necessarily be limited to the facts set forth in the charge. It does mean that a commissioner must show on the face of the charge that he was in possession of information which he believed to have some basis in fact and which therefore formed the basis for his initiating the charge. By requiring that a commissioner's charge set forth the facts on which it was based, it is apparent that Congress did not intend to authorize Commission investigations based on nothing more than official suspicion or curiosity.

In this case the Commissioner merely charged Bowaters with three general types of discriminatory practices; discrimination in job classification, discrimination in the use of tests, discrimination in the apprenticeship and on-the-job training programs. As to what facts the Commissioner may have had as a basis for making these charges, there is not a word in the charge. The Court is accordingly of the opinion that the charge failed to comply with the requirements of § 2000e-5(a) of the Act.

It is further clear from the statutory language that the filing of a valid charge is jurisdictional to the authority of the Commission to initiate an investigation. While the Commission's determination with respect to the validity of the charge is entitled to great weight by the Court, **International Chemical Workers Union v. Planters Mfg. Co.**, 259 F. Supp. 365, 366-367 (S. D. Miss., 1966), **Cox v.**

U. S. Gypsum Co., 284 F. Supp. 74, 78 (N. D. Ind., 1968), and while, as stated by the Commission, the courts generally do not subject administrative jurisdictional determinations to judicial review unless the administrative action is plainly contrary to the clear language of the statute or is unconstitutional, **American Fed. of Labor v. NLRB**, 308 U. S. 401, 409-411 (1940), **affirming** 103 F. 2d 933 (D. C. Cir., 1939); **Madden v. Brotherhood of Transit Employees**, 147 F. 2d 439 (4th Cir., 1945), **reversing** 58 F. Supp. 366 (D. Md., 1944); **Leedom v. Kyne**, 358 U. S. 184 (1958), **affirming** 249 F. 2d 490 (D. C. Cir., 1957), **affirming** 148 F. Supp. 597 (D. D. C., 1956), it is clear in this instance that the Commission's jurisdictional determination was contrary to the statute. The charge being legally insufficient to invoke the investigative jurisdiction of the Commission, the demand here involved must be set aside.

The Commission has cited unto the Court an unpublished opinion from the Northern District of California in the case of **Local No. 104, Sheet Metal Workers International Association, AFL-CIO et al. v. Equal Employment Opportunity Commission** (49,201 filed January 14, 1969), as authority in support of its contentions in regard to the validity of the charge in this case. In the cited case the Court did hold a general charge of union discrimination to be legally sufficient to support a demand for access to union records. Insofar as that case held a general or "pattern" charge of discrimination, as distinguished from a charge of individual discrimination, is valid under the Act, the opinion would appear to be sound. To the extent that the Court may have arrived at a different conclusion than stated in this opinion with respect to the necessity of setting forth the facts upon which the charge was based, this Court respectfully declines to follow the cited case. While it does appear that the Court in the above case did approve a somewhat similar general charge, the Court

there omitted mention of the statutory language requiring that the charge set forth the facts upon which it was based.

Having concluded that the Commission was without jurisdiction to initiate the investigation here undertaken, because of the failure of the Commissioner's charge to state any facts on which it was based, the Commission's motion for enforcement of the Demand for Access to Evidence will accordingly be denied and the demand will be set aside.

An order will enter accordingly.

Frank W. Wilson
United States District Judge

APPENDIX D

No. 19824

United States Court of Appeals
For the Sixth Circuit

Bowaters Southern Paper Corporation,
Petitioner-Appellee,
v.
Equal Employment Opportunity Commission,
Respondent-Appellant.

On Appeal from the United States District Court for the Eastern District of Tennessee.

Decided and Filed June 11, 1970

Before: Celebrezze and Brooks, Circuit Judges, and McAllister, Senior Circuit Judge.

Per Curiam. In proceedings under the Civil Rights Act of 1964, appellant Commission filed a motion for enforcement of its Demand for Access to Evidence from appellee company's records regarding various matters with respect to its employees, and its employment practices. The Demand was made pursuant to Section 710 of the Civil Rights Act of 1964, 42 U. S. C. A., Section 2000e-9. The District Court denied appellant Commission's motion on the ground that the charge on which the Demand was founded did not state the facts on which the charge was based, as specifically required by the Act.

On this appeal, it appears that the Commissioner, as the designated representative of appellant Commission, in his charge stated:

> "Pursuant to Section 706(a) of the Civil Rights Act of 1964 [42 U. S. C. A., Section 2000e-5], I charge the following company with unlawful employment practices:
>
> BOWATERS SOUTHERN PAPER CORPORATION
> Calhoun, Tennessee 37309."

The Commissioner followed this charge by the following statement:

> "I have reasonable cause to believe said company is within jurisdiction of the Equal Employment Opportunity Commission and has engaged in the following unlawful employment practices:
>
> 1. Maintenance of racially restricted job classifications.
>
> 2. Discriminatory use of tests, restricting Negro employees to lower paying jobs.
>
> 3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs.
>
> JUL 19 1967 s/ Samuel Jackson
> Date Commissioner"

The only issue is whether the Commissioner, after making the above-mentioned charge stated the facts on which that charge was based. Appellant Commission says that the Commissioner did state the facts on which the charge was based; the appellee company says that he did not.

It is conceded that the Commissioner need not set forth the names of employees who have allegedly suffered discrimination, nor is the Commissioner obliged to reveal

his sources of information, which might deter individuals from making complaints for fear of retaliation.

It is our view that, after making the above charge, the Commissioner stated the facts on which it was based, as being maintenance of racially restricted job classifications; discriminatory use of tests, restricting Negro employees to lower-paying jobs; and denial to Negro employees of the opportunity to participate in apprenticeship and on-the-job training programs. In fact, it is difficult to see what additional information the Commissioner should set forth as facts supporting his charge.

It is to be said that there is no constitutional prohibition to Congress permitting investigations of corporate behavior based upon nothing more than official curiosity, as Judge Wilson, in the District Court, pointed out, citing *United States v. Morton Salt Company*, 338 U. S. 632.

Appellant Commission has cited to us, as sustaining its position that the charge set forth the facts on which it was based, the following adjudications: *South Central Bell Telephone Company v. E. E. O. C.*, ... F. Supp. ...., *Motorola, Inc. v. E. E. O. C.*, ... F. Supp. ... (decided December 31, 1969), and *Blue Bell Boots, Inc. v. Equal Employment Opportun. Comn.*, 418 F. 2 355 (C. A. 6, 1969). While those cases did not decide the question whether the charges in those cases were based upon the facts set forth by the Commissioner, nevertheless, they are notable for the fact that, although that question was not raised or decided in those cases, the statements of facts upon which the charge was based were almost identical to the facts as stated in the instant case as being those upon which the charge was based.

In accordance with the foregoing, the judgment of the District Court is reversed, and the case remanded with directions to grant the Commission's motion for enforcement of its Demand for Access to the Evidence, as requested.

APPENDIX E

No. 19,824

United States Court of Appeals
For the Sixth Circuit

Bowaters Southern Paper Corporation,
Petitioner-Appellee,

v.

Equal Employment Opportunity Commission,
Respondent-Appellant.

Order Denying Petition for Rehearing

(Filed Jul. 17, 1970)

Before: Celebrezze and Brooks, Circuit Judges, and McAllister, Senior Circuit Judge

The above cause coming on to be heard on Appellee's petition for rehearing, and the court being duly advised:

Now, therefore, it is Ordered, Adjudged and Decreed that the petition for rehearing be and is hereby denied.

Entered by Order of the Court

/s/ Carl W. Reuss
Clerk

APPENDIX F

State of Tennessee
County of Hamilton

Affidavit of Joseph O. Evans

Personally Appeared before me, Joseph O. Evans, who states that he has been Industrial Relations Manager of Bowaters Southern Paper Corporation, Calhoun, Tennessee, since March 1, 1964, including all times material herein, and who does under oath depose and say:

(1) I have been in a responsible position involving personnel policies of Bowaters since May 1, 1957. In my capacity as Industrial Relations Manager and related capacities at the Calhoun Plant of Bowaters Southern Paper Corporation, I am familiar with the employment practices and procedures as they apply to our Calhoun operations. At our Calhoun Plant in August 1967, we employed approximately one thousand two hundred fifty (1,250) employees, most of whom were covered by the terms and conditions of a labor agreement with three International Unions. Employees subject to the labor agreement numbered approximately one thousand (1,000) in August 1967. These employees were divided into twelve (12) departments and placed in approximately one hundred forty-eight (148) separate job classifications or categories. In addition, in August 1967, there were approximately two hundred fifty (250) employees not covered by the labor agreement, in a variety of capacities, including supervision, clerical, professional, technical and managerial occupations.

(2) On August 23, 1967, I held a conference with a representative of the Equal Employment Opportunity Commission, Mr. Theodore A. Bukowski, at our plant in Cal-

houn, Tennessee. I had received a Commissioner's charge filed by EEOC Commissioner Samuel Jackson earlier in the month of August. I pointed out to Mr. Bukowski, at our meeting, that the Company was completely in the dark as to what brought about or constituted the charge by the Commissioner, and stated to him that our Company was, as far as we knew, in complete compliance with all the provisions of the Civil Rights Act of 1964. I asked him to explain the meaning of the charge and to what it related. Bukowski told me that the Commission had received information from an unidentified source, and told me that we were not entitled to know who had made a complaint. Bukowski told me: "You must assume, as we do, that it is all your Negro employees." I told the investigator I would make no such assumption.

(3) I explained to Bukowski that I seriously doubted that any of our Negro employees had complained, pointing out that there was not a single one of our employees who did not know there is no apprenticeship program in the mill, and the charge alleged that Negroes were denied participation in apprenticeship programs. I specifically told Mr. Bukowski that we were at a loss to know how to protect ourselves from the charge. Investigator Bukowski informed me that the Company had a right to reply in writing to the charges made by the Commissioner. He did not explain how this was possible in the absence of specific information.

(4) Investigator Bukowski told me that even though we did not have an apprenticeship program, this would not affect the charge. He said that the Complaint would be investigated and a report sent to Washington and that Washington would determine whether or not there had been a violation. He said the next step was to conciliate and if conciliation was unsuccessful, it would be turned over to the Justice Department to handle through the Courts.

(5) I discussed with Bukowski the fact that we had three International Unions representing employees at our plant: to wit, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, United Papermakers and Paperworkers, and International Brotherhood of Electrical Workers. I inquired as to whether or not they had been charged and he advised me that they had not. I pointed out that our labor agreement was not discriminatory and later furnished him, through counsel, a copy of the then current labor agreement, which contains the following statement: "The Company and the Union, individually and collectively, agree that in the application of the terms of this agreement, they will not discriminate because of race, color, religion, national origin, or sex."

(6) I wish to state that we have not had a grievance by the Union or by any individual employee of any discrimination by reason of race or color under the labor agreement. The Commissioner's charge we received in August, 1967 is the only charge filed against us with EEOC. There have been no EEOC charges filed by individual employees or applicants for employment contesting, in any way, our employment policies. It is our policy **not** to discriminate by reason of race, creed, color, sex, or national origin.

(7) Following my conference with Investigator Bokowski, I communicated with our attorneys, Constangy & Prowell, Atlanta, Georgia, and asked their assistance in determining from EEOC the basis for the charge. Investigator Bukowski had requested voluminous information concerning all of our employees, specifically asking for a list of all employees on the payroll, with Negro employees specified, together with the files of all Negro employees in our employ. He further requested a number of additional items and general access to our files, and indicated that he would return seeking more information after having received what he had requested.

(8) At my request and direction, our attorneys addressed a letter to Mr. Bukowski dated September 26, 1967, a copy of which is attached hereto as Exhibit 1. I informed our attorneys that I could not determine from the charge, what information should properly be provided, if any, and asked their assistance and advice as to whether or not it was necessary that we go to the time, trouble, and expense of preparing the information which Mr. Bukowski had requested. I also told them that I had given Mr. Bukowski a copy of the statistical information (the EEO-1 form) which the Company is required to file by the EEOC Rules and Regulations, as well as certain tests which he had requested during his visit. At my request, our attorneys forwarded to Mr. Bukowski a copy of our then current labor agreement along with a copy of our annual report, which he had requested.

(9) I had made it clear to Mr. Bukowski that we were concerned about this charge, and that we intended to cooperate fully, but that we wished to review the matter with our attorneys, and we needed to know what the charge was about before we turned over all our books and records. I explained to our attorneys the investigator's unwillingness to identify any individual who might have a complaint or the source of the charge, and asked that, on the Company's behalf, the Commission be assured that it was not our purpose or policy to discriminate against anyone. Our attorneys advised us that the law required that persons furnishing evidence to the Commission were protected by law against discrimination and I said that this was surely not our intention. Our only purpose was to know whether or not there was a problem in our plant among our work force, and if so, who it concerned in order that it might be properly rectified.

(10) In communicating with the investigator, our attorneys pointed out that we were aware of the provisions

of the Act which make it unlawful to discriminate because of a charge, testimony, assistance, participation in the investigation or any proceeding under the Act. Our attorneys advised me that they were unable to assist us in determining what information was relevant or material until such time as information was received from EEOC, which was requested in our attorneys' letter of September 26, 1967.

(11) I subsequently received a copy of a letter which Investigator Bukowski sent to our attorneys dated September 29, 1967, a copy of which is attached hereto as Exhibit 2, in which Mr. Bukowski stated that the letter was under "active consideration" and promised to be in touch with us "in the near future". Eleven months later, in August 1968, our Company received a "Demand for Access to Evidence" from the Commission. I was advised by our attorneys that there had been no reply to the letter of September 26, 1967, and that we still did not know a claimed factual basis for the charge.

(12) I approved the recommendation of our attorneys that we seek, **from the Commission**, the facts on which the charge was based in order to determine the purpose, relevancy and materiality of the information requested in the "Demand for Access to Evidence" which EEOC had served upon us. Our attorneys filed a "Motion to Set Forth and Produce Facts Upon Which Commissioner's Charge is Based", at my instructions, and forwarded to me a letter dated August 19, 1968, from the Director of the EEOC's Birmingham Regional Office, which is attached hereto as Exhibit 3, in which receipt of our Motion was acknowledged and the statement made that it had been forwarded to the EEOC's General Counsel.

(13) Upon the advice of our attorneys that the law required that we petition to set aside the "Demand for Access to Evidence" within twenty (20) days of its receipt

and in view of the failure of the EEOC to answer our letter of September 26, 1967, or reply to our Motion, I authorized our attorneys to file in Federal District Court a Petition to Set Aside the Demand for Access to Evidence.

(14) The compilation of the material asked for in the "Demand for Access to Evidence" would require considerable expense and time to prepare, and I have no way of knowing in what manner this could be used as a basis for an investigation. Information in all items, seeking racial identity, would have to be determined carefully and possibly inaccurately since our records do not indicate race. The periods of time, going back one year from January 19, 1968, would present difficult and burdensome problems of record reconstruction. In Item 5, for instance, requesting data on temporary promotions, we estimate that approximately eighty such temporary transfers or promotions occur **each day**, and it would require literally weeks to compile the information requested in order to respond to this item of the Demand alone. Furthermore, I have no knowledge of any factual claims that would make the compilation of this material necessary, and do not know what information we could supply that would be relevant in a defense to the broad and general charges that were filed.

(15) Commissioner Jackson's charge is dated July 19, 1967. Upon receiving this charge and immediately after my conference with Investigator Bukowski, at the request of our attorneys, we examined our records for the ninety (90) days preceding the charge in order to determine whether any one of our Negro employees had requested transfers to other job classifications or had been tested. During that period, there was a limited number of transfer applications and no current application for transfer from any Negro employee. There was no occasion, during the ninety (90) days preceding Commissioner Jackson's

charge of July 19, 1967, to act upon the results of any test of any Negro employee seeking a transfer.

I have read this affidavit of six pages and swear that it is true.

/s/ Joseph O. Evans
Joseph O. Evans

Sworn and subscribed to before me this 11 day of October, 1968.

Mary Ann Greeson
Notary Public

My commission expires: 12/5/70.

EXHIBIT 1

September 26, 1967

Mr. Theodore A. Bukowski
Equal Employment Officer
Equal Employment Opportunity Commission
1776 Peachtree Street, N. E.
Atlanta, Georgia

Re: Bowaters Southern Paper Corporation
Calhoun, Tennessee

Dear Mr. Bukowski:

The Company has recently forwarded to me certain information which you requested at the time of your meeting with its representatives in Calhoun on August 23, 1967. I am enclosing herewith the Annual Report for 1966, which you requested, and a copy of the current

Labor Agreement between Bowaters Southern Paper Corporation and three International Unions. It is my understanding that at the time of your visit, you were given copies of the EEO-1 Form which the Company filed earlier this year and copies of the tests which the Company uses. We intend to provide additional information and to cooperate fully in the investigation of the charge by Commissioner Samuel Jackson, which is dated July 19, 1967.

Commissioner Jackson's charge avers that the Company has engaged in the following unlawful employment practices:

(1) Maintenance of racially restricted job classifications.

(2) Discriminatory use of tests, restricting Negro employees to lower paying jobs.

(3) Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs.

It is my understanding that at the time of your conference with the Company on August 23, 1967, you were asked whether or not the person bringing the charge to Commissioner Jackson's attention would be identified, and that you replied in the negative. As you can no doubt appreciate, I cannot adequately advise my client concerning the relevancy of any information that he ought to provide in the course of the investigation until I have some basic facts. Section 709(a) of the Civil Rights Act of 1964 is rather precise in requiring that the Commission's representative shall have access to evidence so long as it is ". . . relevant to the charge under investigation." Moreover, the provisions of Section 706(a), relating to a charge filed by a Commissioner, specifically provide that ". . . such a charge sets forth the facts upon which it is based." Commissioner Jackson's charge makes three alle-

gations which, on their face, would constitute unlawful employment practices, but the charge does not set forth any factual basis for these allegations. As the representatives of the Company explained to you, the Company does not maintain an apprenticeship or formal on-the-job training program, and this is certainly known by every employee.

With respect to the allegation that the Company maintains racially restricted job classifications, I refer you to Section XIV of the attached Labor Agreement which concerns transfers. There are no job classifications which are racially restricted. If you will examine the exhibits to the attached Labor Agreement, you will see that there are progressions within departments. In order to be considered for transfer, an employee must make an application and such active applications (either made or renewed within the past three months) are reviewed in filling bottom jobs in the line of progression. Otherwise, vacancies are filled by the next employee in line.

We believe that Commissioner Jackson must have been given misinformation inasmuch as we have been unable to find any current application for transfer from any Negro employee during the 90-day period preceding the filing of the charge by Commissioner Jackson on July 19, 1967. As you know, in a state such as Tennessee, which does not have a state or local agency which has concurrent jurisdiction over charges, it is required by Section 706(d) that the charge, in order to be timely, must be filed within 90 days after the alleged unlawful employment practice occurred. Section XIV (Transfers) has been a part of the collective bargaining agreement since July 3, 1965, which coincides with the effective date of the Civil Rights Act of 1964, and a number of employees, both white and Negro, have applied for transfer. All such applications have been considered on their merits, and no applicant for

transfer has been denied a transfer because of his race; and during the 90 days preceding the time that Mr. Jackson's charge is dated, there were no active applications on file by any Negro employees.

The Commissioner's charge also alleges that the Company discriminatorily uses tests, thus restricting Negro employees to lower paying jobs. Once again, we have furnished you with copies of professionally developed tests which are used to measure qualifications for certain jobs. These tests are used impartially with both white and Negro employees, and Section 703(h) of the Act states that it is not an unlawful employment practice ". . . for an employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race. . . ." While the use of these tests are non-discriminatory and Negro employees are not restricted to lower paying jobs, as alleged, there has not been any occasion, during the 90 days preceding Commissioner Jackson's charge of July 19, to act upon the results of any test for any Negro employee.

In view of the foregoing, we submit that Commissioner Jackson must have been given utter misinformation upon which to base his charge. We believe that the investigation could proceed most meaningfully and expeditiously if it were first determined by the Commissioner or by yourself that any particular employee or former employee could be identified and information given us as to when and which job classification he was allegedly restricted from because of his race, and which employee allegedly was given a test that was used to restrict him to a lower paying job, and when this occurred. In this connection, the Company is well aware of the provisions in Section 704(a) which make it unlawful to discriminate because

of a charge, testimony, assistance or participation in an investigation or proceeding under the Act.

By EEOC's procedural rules and regulations, 29 CFR Part 1601.14, a respondent is to be given an opportunity to submit a statement of its position or evidence with respect to the allegations. Procedural due process requires no less, and in view of the broad allegations set forth in Commissioner Jackson's charge, and without pertinent facts upon which to determine the timeliness of the allegations of the identity of any person aggrieved, my client would be deprived of representation and of valuable statutory rights, including proper notice.

Please bring my thoughts to the attention of Commissioner Jackson, or to the appropriate representative of the Commission, in order that I may advise my client properly concerning the relevancy of the information requested, and be afforded the opportunity to submit evidence and a more precise statement of position with respect to the allegations.

Very truly yours

James F. Smith

JFS/em

EXHIBIT 2

Atlanta Regional Office
Equal Employment Opportunity Commission
1776 Peachtree Street, N. W.
Atlanta, Georgia 30309

September 29, 1967

Mr. James F. Smith
Constangy & Prowell
1900 Peachtree Center Building
230 Peachtree Street, N. W.
Atlanta, Georgia 30303

Re: Bowaters Southern Paper Corp.

Dear Mr. Smith:

Your letter of September 26, 1967 has been received and is under active consideration.

We will be in contact with you in the near future.

Yours very truly,

/s/ Theodore A. Bukowski
Theodore A. Bukowski
Equal Employment Officer

EXHIBIT 3

Birmingham Area Office
Equal Employment Opportunity Commission
2121 8th Avenue North
Birmingham, Alabama 35203

August 19, 1968

Mr. James F. Smith
Attorney At Law
c/o Constangy & Prowell
1900 Peachtree Center Building
230 Peachtree Street, N. W.
Atlanta, Georgia 30303

Re: Bowater Southern Paper Corp.
v. EEOC Case No. CBI 68-12-312
(Commissioner Charge)

Dear Mr. Smith:

I have received your **MOTION TO SET FORTH AND PRODUCE FACTS UPON WHICH COMMISSIONER'S CHARGE IS BASED** in Case No. CBI 68-12-312 and your letter dated August 15, 1968, and have forwarded a copy to our General Counsel. I am awaiting guidance from him.

Very truly yours,

/s/ Alan J. Gibbs
Alan J. Gibbs
Director